IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

TRINIDAD C. MILLS, a married woman in her sole and separate right; MELISSA DELLA SANTA, a widow, individually and as surviving spouse of JEFFREY DELLA SANTA, deceased, and for and on behalf of CEAZON DELLA SANTA and CYRUS DELLA SANTA, minor children, Plaintiffs/Appellants, v. MICHAEL S. WOODLOCK and JANE DOE WOODLOCK, husband and wife, and LITTLE & LITTLE, P.C., a professional corporation, Defendants/Appellees.	2 CA-CV 2006-0182 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20055872

Honorable Michael D. Alfred, Judge

REVERSED AND REMANDED

Aboud & Aboud, P.C.
By Michael J. Aboud and Shelley L. Aboud — Tucson
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V Á S Q U E Z, Judge.

¶1 In this legal malpractice action, appellants Trinidad Mills and Melissa Della Santa[1] appeal from the trial court's grant of summary judgment in favor of appellees Michael Woodlock and Little & Little, P.C. (collectively "Woodlock"). Mills and Della Santa argue the trial court erred in ruling that their claim was barred by the statute of limitations. For the following reasons, we reverse.

Background

¶2 Although the pertinent facts of this case are largely undisputed, we view them in the light most favorable to the party opposing the motion below. *Hill-Shafer P'ship v. Chilson Family Trust*, 165 Ariz. 469, 472, 799 P.2d 810, 813 (1990). In 1989, Donald Garlock executed his will in which he left the residue of his estate to a revocable trust. On September 14, 2001, Woodlock, who was then employed by the law firm of Little & Little, P.C., prepared a codicil to Garlock's will. The codicil provided that four of his caregivers,

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[1]Mrs. Della Santa filed her claim on behalf of her deceased husband Jeffrey Della Santa, herself, and their minor children.

including Mills and Jeffrey Della Santa, were each to receive a bequest of money. Garlock died on January 22, 2003. In March 2003, his son filed a petition for appointment of personal representative and formal probate of the will. In the petition, Garlock's son also challenged the validity of the codicil, alleging Garlock had been unduly influenced by at least one of the beneficiaries under the codicil. However, Garlock's son withdrew his challenge to the codicil in August 2003, after he had been appointed the personal representative of the estate.

¶3 Because the bulk of Garlock's assets were held in the revocable trust, there were insufficient assets in the estate to pay the bequests to Mills and Della Santa under the codicil. On March 29, 2004, Mills and Della Santa filed a "Petition for Determination of Trust Beneficiaries," essentially requesting that the probate court declare the codicil effectively amended the trust to allow them to recover their bequests from the trust assets. The probate court denied their petition and granted summary judgment in favor of the estate on September 21, 2004. The final inventory of the estate and the petition for leave to close the estate were filed in May 2005. The court issued an order for leave to close the estate in September 2005.

¶4 On October 20, 2005, Mills and Della Santa filed this lawsuit against Woodlock, claiming he had been negligent in drafting the codicil in September 2001 because he had not ensured that Garlock's trust had also been amended. Woodlock answered the

complaint, asserting that Mills and Della Santa's claim was barred by the statute of limitations.

¶5 Woodlock later filed a motion for summary judgment, asserting that Mills and Della Santa had suffered damages "shortly after Mr. Garlock's death" and "no later than the time the bequests were first contested and the estate refused to pay the bequests." Thus, Woodlock argued, Mills and Della Santa's cause of action had accrued shortly after January 22, 2003, which was more than two years before they had filed their complaint in October 2005. Mills and Della Santa argued their cause of action accrued on September 21, 2004, the date the probate court granted summary judgment in favor of the estate after determining the codicil had not effectively amended the trust. They asserted it was not until the probate court's ruling that they suffered damages as a result of Woodlock's negligence. The trial court granted summary judgment in favor of Woodlock, ruling that the lawsuit was barred by the statute of limitations. The court found that Mills and Della Santa's cause of action had accrued "shortly after Mr. Garlock's death . . . when they did not receive the monetary gifts provided and the [c]odicil itself was contested." This appeal followed.

Standard of Review

¶6 We review a trial court's grant of summary judgment de novo, remaining "mindful that 'the statute of limitations defense is not favored.'" *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 198 Ariz. 173, ¶ 5, 7 P.3d 979, 981 (App. 2000), *quoting Logerquist v. Danforth*, 188 Ariz. 16, 22, 932 P.2d 281, 287 (App. 1996). Summary

judgment is appropriate if there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c), 16 A.R.S., Pt. 2.

Discussion

¶7 On appeal, Mills and Della Santa argue the trial court erred in granting summary judgment in favor of Woodlock on the ground that their claim was barred by the statute of limitations. In Arizona, legal malpractice claims are governed by the statute of limitations for tort claims in A.R.S. § 12-542, which provides that such claims must be brought "within two years after the cause of action accrues." *See Kiley v. Jennings, Strouss & Salmon*, 187 Ariz. 136, 139, 927 P.2d 796, 799 (App. 1996). Arizona applies the discovery rule to determine when a cause of action for legal malpractice accrues. *Commercial Union Ins. Co. v. Lewis & Roca*, 183 Ariz. 250, 254, 902 P.2d 1354, 1358 (App. 1995). "[T]he discovery rule applies not only to discovery of negligence, but also to discovery of causation and damage." *Id.*, 183 Ariz. at 257, 902 P.2d at 1361.

¶8 When an attorney commits legal malpractice in the "non-litigation context, the cause of action accrues when the plaintiff knew or should have known that [the] attorney[] had provided negligent legal [services], and that the attorney['s] negligence was the direct cause of harm to the plaintiff, notwithstanding that the plaintiff's damages may not have been fully ascertainable." *Glaze v. Larsen*, 207 Ariz. 26, n.1, 83 P.3d 26, 30 n.1 (2004). In other words, the client must know, or in the exercise of reasonable diligence should

know, not only of the attorney's negligent conduct, but also that he or she "has sustained actual and appreciable harm from the attorney's conduct." *Commercial Union*, 183 Ariz. at 254, 902 P.2d at 1358. Actual and appreciable harm is that which is nonspeculative, irremediable, and "'irrevocable.'" *Id., quoting Amfac Distrib. Corp. v. Miller*, 138 Ariz. 152, 154, 673 P.2d 792, 794 (1983). Thus, the key issues here are when Mills and Della Santa knew or should have known that Woodlock had been negligent in not ensuring the trust had been amended and that they had sustained actual and appreciable harm from that negligence. It is on that date that Mills and Della Santa's cause of action accrued.

¶9 As they did below, Mills and Della Santa contend they did not discover Woodlock's negligence or that his negligence had caused them irremediable or irrevocable harm until the probate judge granted summary judgment in favor of the estate on their claim that the codicil was an effective amendment of Garlock's trust. Thus, Mills and Della Santa argue that, because their cause of action did not accrue until September 21, 2004, the date of the summary judgment ruling, their legal malpractice lawsuit, filed within two years of that date in October 2005, was timely.

¶10 In support of their position Mills and Della Santa rely on this court's decision in *CDT*. CDT provided photocopying services in Arizona and other states. 198 Ariz. 173, ¶ 2, 7 P.3d at 980. In 1981, CDT hired an accounting firm whose services included giving financial and tax advice. *Id*. CDT terminated the firm's services in late 1989 or early 1990, and retained ARL, which provided the same services for CDT in California through 1994.

Id. In 1994, the State of California began a routine audit of CDT's sales tax account for the period October 1986 through December 1994. *Id*. ¶ 3. When the audit was completed in 1995, the field investigator who had conducted it informed CDT of his findings and of his intent to recommend that CDT be assessed an intentional evasion penalty for nonpayment of taxes. *Id*. CDT challenged the assessment administratively and filed a lawsuit against its former accounting firm in 1996. *Id*. ¶ 4. In 1997, CDT amended its complaint to include ARL as a defendant. *Id*. The trial court granted ARL's motion for summary judgment on the ground that the statute of limitations had run, finding as follows:

> After the March 1995 audit by the [state], the plaintiff knew or should have known that the defendant was negligent in not detecting the plaintiff's failure to pay California sales tax for the period of October 1, 1986, through December 31, 1994. The plaintiff also had knowledge that it had suffered appreciable non-speculative damage as a result of the defendants' negligent conduct because of the auditor's March 1995 determination that the plaintiff had substantial sales tax liability and would likely face severe penalties. Whether the plaintiff would ultimately be legally required to pay this liability and the precise calculation of amounts due and owing is irrelevant to this Court's determination of the accrual of the plaintiff's cause of action.

Id.

¶11 But, we disagreed with the trial court's finding that "'appreciable, non-speculative harm or injury immediately flowed' from the [state] field investigator's post-audit, oral statements to CDT in March 1995." *Id*. ¶ 21, *quoting Commercial Union*, 183 Ariz. at 256, 902 P.2d at 1360. We reversed the grant of summary judgment,

concluding that, "[c]ontrary to the trial court's ruling, '[w]hether [CDT] would ultimately be legally required to pay [the tax] liability' is relevant in determining the accrual date." *Id*. ¶¶ 21, 32 (first alteration added).

¶12 Mills and Della Santa point out that in *CDT* this court relied on *Commercial Union*, decided by Division One. In *Commercial Union*, the insurance company requested a legal opinion from its attorneys on the issue of coverage for a particular claim. 183 Ariz. at 252, 902 P.2d at 1356. An attorney rendered an opinion that insurance coverage did not exist but in doing so, the attorney "overlooked an Arizona Supreme Court decision . . . holding a similar policy exclusion unenforceable." *Id.* The insurance company denied coverage, initially relying on the legal opinion, but it proceeded to litigate the issue even after it learned of its attorneys' negligence. *Id*. at 253, 902 P.2d at 1357. The trial court in the coverage action denied the insurance company's motion for summary judgment made on the ground there was no coverage under the policy as a matter of law. *Id.* at 253-54, 902 P.2d at 1357-58. After the coverage case was settled, more than two years later, the insurance company filed a malpractice action against the attorneys. *Id*. at 252-53, 902 P.2d at 1356-57. The trial court dismissed the malpractice action, ruling it was barred by the statute of limitations. *Id.* at 252, 902 P.2d at 1356. In reversing the trial court's ruling, Division One held "the discovery rule applies not only to the discovery of negligence, but also to discovery of causation and damage." *Id*. at 253, 902 P.2d at 1357. The court reasoned that "until the trial court relied on [the controlling case authority] to deny

Commercial Union's motion for summary judgment, Commercial Union had no reason to know that [its damages] were the direct result of [its attorneys'] negligence." *Id*.

¶13 Similarly, Mills and Della Santa assert that, until the probate judge rejected their claim that the codicil was an effective amendment to the trust, they "had only a threat of harm, a potential and speculative chance of harm that could in fact have been avoided had [he] ruled in their favor." We agree; it was not until that date that they sustained actual and appreciable harm. There is nothing in the record supporting the trial court's ruling, and Woodlock's continuing assertion on appeal, that the cause of action accrued "shortly after Mr. Garlock's death . . . when they did not receive the monetary gifts provided and the [c]odicil itself was contested."

¶14 Woodlock relies on *Arizona Management Corp. v. Kallof*, 142 Ariz. 64, 688 P.2d 710 (App. 1984), to support this argument that Mills and Della Santa sustained actual and appreciable harm at the time the estate challenged the codicil. This reliance is misplaced. As pointed out by Division One in *Commercial Union*, the plaintiff's harm in *Kallof* "was not only immediate and appreciable, it was 'readily apparent.'" 183 Ariz. at 256, 902 P.2d at 1360, *quoting Kallof*, 142 Ariz. at 68, 688 P.2d at 714; *see also CDT*, 198 Ariz. 173, ¶ 30, 7 P.3d at 987. We cannot say the same here, where the estate challenged the codicil on the ground that it had been procured through undue influence. That challenge, being unrelated to whether the codicil effectively amended the trust, did not put Mills and Della Santa on notice that they would not receive their money because the trust

had not been amended. Thus, at the time the estate challenged the codicil, Mills and Della Santa did not yet know, nor should they in the exercise of reasonable diligence have known, that they would not receive their bequests because Woodlock had negligently failed to also amend the trust. Accordingly, Mills and Della Santa had not yet sustained actual and appreciable harm at the time the estate challenged the codicil. *See Commercial Union*, 183 Ariz. at 256, 902 P.2d at 1360 (distinguishing *Kallof* in determining when plaintiff had sustained harm).

¶15 We also find instructive this court's decision in *Tullar v. Walter L. Henderson, P.C.*, 168 Ariz. 577, 816 P.2d 234 (App. 1991). In that case, the plaintiffs alleged their attorney's negligent advice had caused them to accept an unsecured promissory note as partial payment for the sale of real property. *Id*. at 578, 816 P.2d at 235. This court found that the record supported the trial court's finding that the sellers had known or should have known that the note was unsecured no later than the date the buyer failed to timely pay the first installment. *Id*. However, we also found that the sellers had not suffered irrevocable damages from their attorney's negligent advice on that date because the buyer could have still paid the note. *Id*. at 579, 816 P.2d at 236. We held that it was not until after the buyer missed the second payment that the sellers "knew or should have known [the buyer] could not pay the purchase price according to the terms of the note" and the sellers sustained appreciable harm. *Id*. at 580, 816 P.2d at 237. Thus, we concluded that the sellers'

complaint, filed within two years of that accrual date, was timely, and reversed the trial court's grant of summary judgment in favor of the buyer. *Id.*

¶16 Mills and Della Santa did not sustain appreciable harm until the probate judge ruled against them on their claim that the codicil constituted an amendment to the trust. Indeed, had the probate judge instead agreed with them that the codicil amended the trust, not only would they not have suffered any harm (because they would have received their bequests) but Woodlock would not have been negligent (because he would have, in effect, amended the trust). At a minimum, until the probate judge ruled against Mills and Della Santa, their harm was merely speculative and their cause of action had not accrued. *See id.; see also CDT*, 198 Ariz. 173, ¶¶ 10-11, 7 P.3d at 982 (stating that cause of action for professional malpractice does not accrue until plaintiff knows or should know plaintiff had sustained nonspeculative harm). Thus, as their cause of action did not accrue until September 2004, Mills and Della Santa's complaint filed in October 2005 was timely.

Conclusion

¶17 The judgment is reversed, and this matter is remanded for further proceedings consistent with this decision.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge